STATE OF MICHIGAN

COURT OF APPEALS

BANK OF NEW YORK,

Plaintiff-Appellee,

v

FIFTH THIRD BANK,

Defendant-Appellant.

UNPUBLISHED
May 14, 2009

No. 282499
Genesee Circuit Court
LC No. 06-085144-CH

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

In this mortgage priority dispute, defendant Fifth Third Bank appeals as of right from the trial court's order granting summary disposition in favor of plaintiff Bank of New York pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings consistent with this opinion.

Defendant challenges the trial court's order granting summary disposition, arguing that it is entitled to priority under MCL 565.29 because it is a "good faith purchaser for a valuable consideration" and because it recorded its interest in the property first. A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id*. A question of fact exists when reasonable minds could differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries* (*On Rehearing*), 441 Mich 379, 398-399; 491 NW2d 208 (1992). Only "the substantively admissible evidence actually proffered" may be considered. If there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, summary disposition is properly granted. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law.

"'Michigan is a race-notice state, and owners of interests in land can protect their interests by properly recording those interests.'" *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006), quoting *Lakeside Ass'n v Toski Sands*, 131 Mich App 292, 298; 346

NW2d 92 (1983). Pursuant to Michigan's recording statute, MCL 565.29, "the holder of a real estate interest who first records his interest generally has priority over subsequent purchasers." *Richards*, *supra* at 539. MCL 565.29 provides:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

Defendant argues that it is entitled to priority under MCL 565.29 because it is a "subsequent purchaser in good faith and for a valuable consideration"[1] who recorded its property interest first.[2] A bona fide purchaser is a party who acquires an interest in real estate for valuable consideration and in good faith, without notice of a third party's claimed interest. 1 Cameron, Michigan Real Property Law (3rd ed), § 11.20, pp 395-396; see also *Richards*, *supra* at 539. "A bona fide purchaser takes the property free from, and not subject to, the right or interest of that third party." Cameron, *supra* at § 11.20, p 396. The question presented in this case is whether defendant may be considered a good-faith purchaser when it knew that its interest was intended to be subordinate, but the primary mortgagee turns out to be a different party from the one that defendant expected to be primary.

We hold that defendant is not a good-faith purchaser because it had actual knowledge that its mortgage would be secondary to a primary mortgagee. It is undisputed that defendant was aware at all times before it executed its mortgage that the mortgage was intended to be subordinate to a mortgage issued by Infinity Funding ("Infinity"). Defendant's loan application and other loan documents indicated that Mark and Kelly Cornfield were applying for a "2nd Mortgage" that would involve a "Subordinate Lien" on the property. In order to be a good-faith purchaser, a party must acquire an interest in property without notice of a third party's claimed interest. Cameron, *supra* at § 11.20, pp 395-396; see also *Richards*, *supra* at 539. Here, defendant acquired its interest with actual notice of a third party's claimed interest; it was simply not the third party that defendant expected it to be. Because defendant was aware of the existence of a prior unrecorded mortgage on the property, however, it is not a good-faith

---

[1] Under MCL 565.34, a purchaser "shall be construed to embrace every person to whom any estate or interest in real estate, shall be conveyed for a valuable consideration, and also every assignee of a mortgage, or lease, or other conditional estate." Defendant's mortgage constitutes a "conveyance" under MCL 565.29 because under the statute, that term is construed to encompass "every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned." MCL 565.35.

[2] For purposes of this argument only, defendant assumes that the nBank mortgage closed before defendant closed its mortgage. As subsequently discussed, however, there exists a question of fact regarding which mortgage was executed first.

purchaser. See *Matosh v Metro Trust Co*, 262 Mich 201, 202-203; 247 NW 156 (1933); *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

Defendant argues that the terms of the nBank, N.A. (nBank),[3] mortgage are substantially different from those of the proposed Infinity mortgage and that it would not have agreed to subordinate its mortgage to nBank because of the higher risk of default that the nBank mortgage posed. Yet defendant was nonetheless aware of the existence of the prior mortgage. If defendant was concerned about the terms of the primary mortgage, it could have attended the closing for that mortgage or taken other measures to verify that the terms had not changed from those originally anticipated or, if the terms had changed, that they were acceptable. If defendant had attended the closing in this case, it would have discovered that nBank, instead of Infinity, was the primary lender.

Although this result may appear to hold defendant to a high standard, the standard is not higher than if defendant had only constructive notice of a third party's interest in the property. In the context of real estate law, notice may be actual or constructive. *Richards*, *supra* at 539. Regarding constructive notice, our Supreme Court has stated:

> When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed. [*Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951).]

Thus, if defendant had constructive notice, rather than actual notice, of the existence of the primary mortgage, it would be chargeable with knowledge of the terms and conditions of the primary mortgage because further inquiry and the exercise of ordinary caution would have revealed such terms. It would be disingenuous to hold defendant to a lesser standard because it had actual, rather than constructive, notice that the primary mortgage existed.

Moreover, according to defendant's reasoning, it would be entitled to priority if Infinity was the primary lender, as expected, and the terms of the Infinity mortgage turned out to be the same as those of nBank's mortgage. Again, if defendant wanted to verify the terms and conditions of the primary mortgage before executing its mortgage, it could have attended the closing on the primary mortgage. Instead, defendant merely assumed that the primary mortgage terms had not changed.

In short, before it executed its mortgage, defendant knew that the mortgage would be subordinate to the $999,000 debt that the Cornfields owed the primary lender. Defendant's mortgage is not entitled to priority merely because the identity of the primary lender and the terms of the primary loan are different from those anticipated. Thus, the trial court did not err by

---

[3] NBank, N.A., is a subsidiary of the bank holding company nBank Corp. NBank, N.A., issued a mortgage to the Cornfields and then assigned the mortgage to plaintiff.

determining that plaintiff would be entitled to priority if the nBank mortgage closed before defendant closed on its mortgage.

Alternatively, defendant argues that plaintiff is not entitled to priority pursuant to MCL 565.29 because nBank did not close its mortgage until the day after defendant closed its mortgage and, thus, defendant was first-in-time and first to record. Although defendant raised this issue in the trial court, the court failed to address it. Although an issue that has been raised but was not addressed and decided in the trial court is generally not preserved for appellate review, appellate consideration of such an issue is not precluded where the lower court record provides the necessary facts. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

We conclude that there exists a genuine issue of material fact regarding which entity closed its mortgage first. Susan Clayton testified that when defendant's representative arrived at Consolidated Title on August 25, 2005, for the "simultaneous" closings, he was informed that only the first mortgage would close at that location and that defendant's mortgage was scheduled to close in Grand Blanc later that day. Some documents from nBank's file, however, show a closing date of August 26, 2005, the day after defendant's mortgage closed. The file also contains notes written on August 24, 2005, that indicate that if certain documents were not received, the closing would not occur on the following day. Moreover, checks relating to the sale are dated August 26, 2005, the day after the purported closing. This evidence creates a question of fact regarding whether nBank's mortgage closed before that of defendant. Because the evidence before the court did not demonstrate that plaintiff was entitled to judgment as a matter of law, the trial court erred in granting summary disposition in favor of plaintiff. Accordingly, we reverse the trial court's order and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra